Supreme Court, U. S.
FILED
JUL 26 1979
DAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1925.

MILLER & SON PAVING, INC.,

Petitioner,

v.

WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION, GEORGE DONAT, MARGARET PERRY, FRANK VIRNELSON, and HARRISON E. DOW, ALDANLEE SPELL, and N. KLINE FISHER, Individually and as Supervisors of Wrightstown Township, Bucks County, Pennsylvania, and WRIGHTSTOWN TOWNSHIP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION BY RESPONDENTS WRIGHTSTOWN TOWNSHIP, HARRISON E. DOW, ALDENLEE SPELL AND N. KLINE FISHER, INDIVIDUALLY AND AS SUPERVISORS OF WRIGHTSTOWN TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA.

LEONARD BARRACK,
GERALD P. RODOS,
PAUL J. MCMAHON,
BARRACK, RODOS & MCMAHON,
2000 Market Street,
Philadelphia, Pa. 19103
(215) 963-0600

Attorneys for Respondents, Wrightstown Township, Harrison E. Dow, Aldenlee Spell and N. Kline Fisher.

Of Counsel:
RONALD H. SHERR,
SPENCER, SHERR & MOSES, P. C.,
107 E. Main Street,
Norristown, Pa. 19401
(215) 279-5300

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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Respondents Wrightstown Township, Harrison E. Dow, Aldenlee Spell and N. Kline Fisher, Individually and as Supervisors of Wrightstown Township, Bucks County, Pennsylvania, respectfully request that this Court deny a writ of certiorari to review the per curiam judgment and opinion of the United States Court of Appeals for the Third Circuit entered on April 2, 1979 and set forth in full in the Petition at Appendix B.

OPINIONS BELOW.

The opinions below are printed in Petitioner's Appendices B and D.

JURISDICTION.

The jurisdictional requirements are adequately set forth in the Petition at page 2.

QUESTIONS PRESENTED FOR REVIEW.

I. Does a Complaint, which alleges a local zoning dispute, state a federal antitrust cause of action where:

(a) no commercial relationship among any of the parties or co-conspirators is alleged; and

(b) the governmental defendants are charged solely with deciding a zoning matter entirely within the authority granted to them under state law?

II. Does a Complaint, which alleges a local zoning dispute, state a federal cause of action against local governmental officials acting pursuant to authority of state law, under Section 1 of the Civil Rights Act of 1871 and the Fourteenth Amendment to the Constitution where:

(a) no allegation of a deprivation of civil rights and no arbitrary or capricious conduct by any defendant is made; and

(b) no allegation of a discriminatory purpose or effect is made?

STATUTES INVOLVED.

§ 601 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10601:

The governing body of each municipality, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of this act.

§ 603 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10603:

Zoning ordinances may permit, prohibit, regulate, restrict and determine:

(1) Uses of land, watercourses and other bodies of water;

(2) Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures;

(3) Areas and dimensions of land and bodies of water to be occupied by uses and structures, as well as areas, courts, yards and other open spaces and distances to be left unoccupied by uses and structures;

(4) Density of population and intensity of use.

In addition, zoning ordinances may contain:

(1) Provisions for special exceptions and variances administered by the zoning hearing board, which provisions shall be in accordance with this act;

(2) Provisions for conditional uses to be allowed or denied by the governing body after recommendations by the planning agency, pursuant to express standards and criteria set forth in the ordinances;

(3) Provisions for the administration and enforcement of such ordinances; and

(4) Such other provisions as may be necessary to implement the purposes of this act.

§ 604 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10604:

The provisions of zoning ordinances shall be designed:

(1) To promote, protect and facilitate one or more of the following: the public health, safety, morals, general welfare, coordinated and practical community development, proper density of population, civil defense, disaster evacuation, airports, and national defense facilities, the provisions of adequate light and air, police protection, vehicle parking and loading space, transportation, water, sewerage, schools, public grounds and other public requirements, as well as

(2) To prevent one or more of the following: overcrowding of land, blight, danger and congestion in travel and transportation, loss of health, life or property from fire, flood, panic or other dangers. Zoning ordinances shall be made in accordance with an overall program, and with consideration for the character of the municipality, its various parts and the suitability of the various parts for particular uses and structures.

§ 605 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10605:

In any municipality, other than a county, which enacts a zoning ordinance, no part of such municipality shall be left unzoned. The provisions of all zoning ordinances may be classified so that different provisions may be applied to different classes of situations, uses and structures and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district, except that additional classifications may be made within any district:

(1) For the purpose of making transitional provisions at and near the boundaries of districts, and

(2) For the regulation, restriction or prohibition of uses and structures at or near (i) major thoroughfares, their intersections and interchanges, and transportation arteries, (ii) natural or artificial bodies of water, (iii) places of relatively steep slope or grade, (iv) public buildings and public grounds, (v) aircraft, helicopter, rocket, and spacecraft facilities, (vi) places having unique historical or patriotic interest or value, (vii) flood plain areas and other places having a special character or use affecting and affected by their surroundings. As among several classes of zoning districts, the provisions for permitted uses may be mutually exclusive, in whole or in part.

§ 609 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10609:

For the preparation of amendments to zoning ordinances, the procedure set forth in this article for the preparation of a proposed zoning ordinance shall be permissive. Before voting on the enactment of an amendment, the governing body shall hold a public hearing thereon, pursuant to public notice. In the case of an amendment other than that prepared by the planning agency, the governing body shall submit each such amendment to the planning agency at least thirty days prior to

the hearing on such proposed amendment to provide the planning agency an opportunity to submit recommendations. If, after any public hearing held upon an amendment, the proposed amendment is revised, or further revised, to include land previously not affected by it, the governing body shall hold another public hearing, pursuant to public notice, before proceeding to vote on the amendment. If a county planning agency shall have been created for the county in which the city, borough, incorporated town or township adopting the ordinance is located, then at least thirty days prior to the hearing on the ordinance by the local governing body, the city, borough, incorporated town or township planning agency shall submit the proposed ordinance to the county planning agency for recommendations.

§ 609.1 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10609.1:

A landowner who desires to challenge on substantive grounds the validity of an ordinance or map or any provision thereof, which prohibits or restricts the use or development of land in which he has an interest may submit a curative amendment to the governing body with a written request that his challenge and proposed amendment be heard and decided as provided in section 1004. The governing body shall commence a hearing thereon within sixty days of this request as provided in section 1004. The curative amendment shall be referred to the planning agency or agencies as provided in section 609 and notice of the hearing hereon shall be given as provided in section 610 and in section 1004. The hearing shall be conducted in accordance with subsection (4) to (8) of section 908 and all references therein to the zoning hearing board shall, for purposes of this section be references to the governing body.

§ 614 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10614:

For the administration of a zoning ordinance, a zoning officer, who may not hold any elective office in the municipality, shall be appointed. The zoning officer shall administer the zoning ordinance with its literal terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the zoning ordinance.

§ 617 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10617:

In case any building, structure, or land is, or is proposed to be, erected, constructed, reconstructed, altered, converted, maintained or used in violation of any ordinance enacted under this act or prior enabling laws, the governing body or, with the approval of the governing body, an officer of the municipality, in addition to other remedies, may institute in the name of the municipality any appropriate action or proceeding to prevent, restrain, correct or abate such building, structure or land, or to prevent, in or about such premises, any act, conduct, business or use constituting a violation.

§ 903 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10903:

The membership of the board shall consist of three residents of the municipality appointed by the governing body. Their terms of office shall be three years and shall be so fixed that the term of office of one member shall expire each year. The board shall promptly notify the governing body of any vacancies which occur. Appointments to fill vacancies shall be only for the unexpired portion of the term. Members of the board shall hold no other office

in the municipality, except that no more than one member of the board may also be a member of the planning commission.

§ 909 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10909:

The board shall hear and decide appeals where it is alleged by the appellant that the zoning officer has failed to follow prescribed procedures or has misinterpreted or misapplied any provision of a valid ordinance or map or any valid rule or regulation governing the action of the zoning officer. Nothing contained herein shall be construed to deny to the appellant the right to proceed directly in court, where appropriate, pursuant to Pa. R. C. P., section 1091 to 1098 relating to mandamus.

§ 510 of the Pennsylvania Second Class Township Code, 53 P. S. § 65510:

The general supervision of the affairs of the township shall be in the hands of three registered electors of the township, who shall be styled township supervisors.

COUNTER STATEMENT OF THE CASE.

The Complaint in this action alleged that defendants violated Section 1 of the Sherman Act, Sections 1, 2 and 6 of the Civil Rights Act of 1871, and the Fourteenth Amendment of the United States Constitution.[1] Named as defendants in the Complaint are Wrightstown Township and its three Supervisors, Harrison E. Dow, Aldenlee Spell and N. Kline Fisher, (collectively referred to as the "Governmental defendants"), who file this brief in opposition to the petition for Writ of Certiorari to the United States

1. Plaintiff subsequently abandoned its claims under Sections 2 and 6 of the Civil Rights Act of 1871.

Court of Appeals for the Third Circuit filed by plaintiff Miller & Son Paving, Inc. (hereinafter "Miller"). Also named as defendants are Wrightstown Township Civic Association, George Donat, the President of the Civic Association and two individuals who reside in Wrightstown Township, Margaret Perry and Frank Virnelson.

The factual allegations of the Complaint state nothing more than a routine zoning dispute which Miller has attempted to make into a federal antitrust suit. Miller owns two plots of land in Wrightstown Township—a 45 acre plot and a 12 acre plot. Miller has owned and quarried the 45 acre plot, which is zoned QA Quarry-Agriculture, since 1959. (Complaint ¶ 14, A-20). In about January, 1973, Miller purchased the 12 acre plot, which is zoned R-2 Residential Agriculture and which abuts the 45 acre plot. (Complaint ¶ 15, A-20). Miller was aware that quarrying was prohibited by Wrightstown Township's zoning ordinances at the time it purchased the 12 acre plot.

Miller's complaint is that it did not receive favorable zoning rulings which would have permitted it to enlarge its stone quarry into the 12 acre plot, and that that Township and its Supervisors, as the legislative arm of the Township, have attempted to stop it from violating the Township's zoning ordinances.[2] Plaintiff does not allege that the governmental defendants conspired for personal gain. Nor does plaintiff allege that the governmental defendants conspired to favor a competitor of plaintiff. In fact, none of defendants have any commercial relationship to plaintiff. Plaintiff's complaint merely recites a history

2. It is important to note that Miller has been quarrying under the protection of the laws of Wrightstown Township for many years. A portion of the township has been zoned so to permit several quarries, including Miller, to conduct their businesses. There is no allegation that defendants have attempted to alter the existing zoning ordinances which permit Miller to quarry in its 45 acre plot.

of zoning litigation which did not have the result plaintiff desired.

Miller's complaint involves three incidents. First, it is alleged that in September, 1974, the Supervisors, acting in response to a citizen's complaint, ordered plaintiff to cease certain activities on its 45 acre plot, and that plaintiff appealed from that order to the Zoning Hearing Board of Wrightstown Township. (Complaint ¶ 18, A21). After several hearings, the Board found for Miller on two alleged violations but found against Miller on other violations. (Complaint ¶ 19, A21). An appeal from that decision is still pending in Pennsylvania courts. Thus, this first allegation is merely that a citizen of Wrightstown Township accused plaintiff of certain zoning violations; that the Township and the Supervisors issued a cease and desist order against plaintiff; that the Zoning Hearing Board (a body completely independent of the Supervisors) held hearings; that the Board found for the plaintiff on two of the allegations and against plaintiff on an unspecified number of other violations; and that appeals of this decision were filed in state courts.[3]

The second incident alleged in the Complaint concerns Miller's application for an amendment to the applicable zoning ordinance by which it sought to expand its quarry into the 12 acre plot which is and was zoned R-2 Residential-Agriculture. (Complaint ¶¶ 21 to 27, A22-A-23). The Complaint states that the Supervisors permitted plaintiff to try to settle the case with the Civic Association and other defendants. (Complaint ¶ 21, A22). Plaintiff concluded that the attempts to settle the matter

3. The Court of Common Pleas for Bucks County affirmed this decision of the Zoning Hearing Board by order dated November 18, 1977. Miller appealed this order to the Pennsylvania Commonwealth Court which also affirmed the finding of the Zoning Hearing Board.

were "unjustifiable" and rejected them. (Complaint ¶ 22, A22). It is alleged that thereafter plaintiff and the Supervisors reached a "mutually agreeable basis" for rezoning the 12-acre plot but that the Civic Association objected and no agreement was concluded. (Complaint ¶¶ 22, 23, A22-A23). This portion of the Complaint ends with the allegation that the Town Solicitor was replaced by another attorney who was assigned the job of handling the litigation. (Complaint ¶¶ 24 to 26, A23). Miller's request for a change in Zoning was denied. (Complaint ¶ 27, A23).[4] Thus, this portion of the Complaint alleges that plaintiff lost an attempt to change the zoning laws. There is no allegation that the zoning ordinances were unfair or that the Supervisors acted unreasonably, capriciously, or arbitrarily.

Finally, the third incident alleged in the Complaint is that the Supervisors caused an appeal to be filed with the Pennsylvania Environmental Hearing Board from the granting to plaintiff of certain mining permits, and that "defendant" (presumably the Civic Association but not actually identified in the complaint) intervened. (Complaint ¶ 28, A23). The Supervisors allegedly took no significant part in the proceeding and supposedly paid for unspecified costs and fees incurred. (Complaint ¶ 29, A24). The Pennsylvania Environmental Hearing Board dismissed the defendants' appeal and mining permits were issued to Miller. Thus, this entire issue is now moot.

Conspicuously absent from these allegations is any suggestion that the Supervisors acted outside their delegated authority. There is no allegation that the Township, the Supervisors or any other defendant acted so as to gain personally or to damage plaintiff's competitive position. No commercial relationship between or among any of the

4. Miller appealed this ruling to the Court of Common Pleas for Bucks County which appeal is pending.

parties is alleged. There is no allegation of arbitrary or capricious action by the governmental defendants or other defendants. There is no allegation that the acts of the governmental defendants or other defendants were intentionally discriminatory or even discriminatory in effect.

In short, the complaint alleges that the government of Wrightstown Township did not permit plaintiff to enlarge its quarrying business and took other acts to enforce its zoning regulations and that the citizens of Wrightstown Township actively supported this decision. What Miller seeks from the federal courts is an advantage not extended to its competitors: being permitted to quarry in an area zoned for residential use and to quarry in a manner prohibited by zoning ordinances.

The governmental defendants and the other defendants filed motions to dismiss the complaint on numerous grounds. The district court granted defendants' motion to dismiss. *Miller & Son Paving, Inc. v. Wrightstown Township Civic Association*, 443 F. Supp. 1268 (E. D. Pa. 1978). The Court of Appeals for the Third Circuit affirmed (A 10 *et seq.*).

REASONS WHY THIS WRIT SHOULD BE DENIED.

The petition for certiorari does not merit review by this Court because the decisions below are in accord with prior decisions of this Court and do not conflict with decisions of other courts.

I. A Complaint Which Alleges Nothing More Than a Local Zoning Dispute Does Not State a Cause of Action Under the Sherman Act.

A. No Commercial Relationship Exists Between the Parties and the Plaintiff Has Not Pleaded That Any Alleged Acts of Defendants Have Put It at a Competitive Disadvantage.

Miller is urging this Court to adopt a rule which would apply the Sherman Act to every concerted activity which has an impact on the business or property of another. This rule is totally unsupported in law, and, if it were adopted, the Sherman Act would apply to every crime or tort committed by two or more persons that had some impact on another's property or business.[5] But the Sherman Act was not intended by Congress to be a general grant of federal jurisdiction to every person who was injured by the joint activity of two or more people.

This Court has long ruled that the Sherman Act was intended by Congress to codify the then existing common law of unfair competition and, as such, extends to conspiracies which have the effect or which are committed with the intent to restrain competition. In *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940) the Court concluded that the intention of Congress in passing the Act:

5. For example, if every conspiracy which injures the business or property of another were a violation of the Sherman Act, then every bank robbery committed by two or more persons would be an antitrust violation.

> "was the prevention of restraints to free competition in business and commercial transactions which tended to restrain production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services. . . ." 310 U. S. at 493.

This Court further stated:

> "Underlying and implicit in all [the cases] is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would be purchasers.'" 310 U. S. at 513.

See also, *Standard Oil Co. v. United States,* 221 U. S. 1 (1911).

This Court's ruling that the antitrust laws are intended only to apply to conspiracies which damage free competition has been uniformly applied by lower courts, for example, *Marjorie Webster Junior College v. Middle Atlantic States Association of Colleges and Secondary Schools,* 432 F. 2d 650 (D. C. Cir. 1970), *cert. denied,* 400 U. S. 965 (1970) and *Donnelly v. Boston College,* 558 F. 2d 634 (1st Cir. 1977).

It is of utmost significance that Miller does not allege that defendants have imposed upon it, either intentionally or unintentionally, an unreasonable competitive restraint. Furthermore, no commercial relationship whatsoever is alleged to have existed between Miller and any of the defendants. The complaint merely states that the governmental defendants applied existing zoning ordinances and prevented plaintiff from expanding its business. The complaint itself states that plaintiff has been conducting its business on the "45-acre plot" since 1959. (Complaint ¶ 14, A15).

Miller attempts to portray its own efforts to circumvent existing zoning ordinances and therefore secure advantages not given to its competitors as attempts by defendants to "destroy its business". Plaintiff's entire case boils down to a complaint that it was not given a special privilege. This complaint obviously does not state a cause of action under the antitrust laws and the Court of Appeals and the District Court have so held.

B. The Complaint Alleges Only That the Governmental Defendants Acted Entirely Within Their Legal Authority in Enforcing Zoning Ordinances and in Deciding Miller's Request for a Change of Zoning; Their Actions Are Thus Beyond the Scope of the Antitrust Laws.

1. The *Noerr-Pennington* Doctrine.

The only allegations of a "conspiracy" under the antitrust laws in this case relate to the actions of public officials in the performance of their duties and responsibilities as members of an elected governmental body who considered the wishes of their constituents when they made decisions in zoning matters. Thus, the alleged "conspiracy" amounts to nothing more than a charge that the Supervisors did what elected officials are supposed to do—consider the view of their constituents.

Such acts by public officials are not violations of the antitrust laws under the doctrine known as *Noerr-Pennington.* As this Court held in *United Mine Workers of America v. Pennington,* 381 U. S. 657 (1965):

> "Joint efforts to influence public officials do not violate the antitrust laws even though intended to elimi-

nate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U. S. at 670.

See also *Eastern Railroad President's Conference v. Noerr Motor Freight,* 365 U. S. 127 (1961).

A clear case is presented in the instant action for the application of the *Noerr-Pennington* doctrine. Here, no allegations of personal involvement on the part of the governmental defendants is alleged. The Supervisors are only alleged to have performed their public duties, and the private defendants are alleged only to have pressed their views on an obviously important local issue before their elected officials. It must be stressed that Miller has not alleged that defendants made an attempt to interfere directly with the business relationships of a competitor, as no competitive relationship exists in this case. Moreover, it has not been alleged that defendants denied Miller free and unlimited opportunity to express its position. Indeed, the complaint clearly states that plaintiff has had and continues to have numerous opportunities to argue its position before local governmental bodies and Pennsylvania courts, none of which have been named as defendants or co-conspirators. (Complaint ¶¶ 19, 21, 28, A16, 17, 18). It was Miller itself which instigated most of the adjudicatory proceedings in this case; it has not been the passive victim of litigation brought against it.

2. The Doctrine of *Parker v. Brown.*

This Court has long recognized that basic constitutional concepts of federalism demand that federal courts do not apply the federal antitrust laws to the workings of state governments. This doctrine was first established in *Parker v. Brown,* 317 U. S. 341 (1942) where officials of the government of the State of California were sued by a

private plaintiff who alleged that they violated the Sherman Act when they applied state law. This Court rejected those allegations:

> "In a dual system of government in which under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed." 317 U. S. at 351.

In the case *sub judice,* the governmental defendants are alleged to have violated the Sherman Act by their actions in applying the Pennsylvania Municipalities Planning Code. 53 P. S. § 10101, *et seq.* The actions of the governmental defendants are nothing more than the actions of a local government ruling on routine zoning matters. As such, the governmental defendants are protected by the rule as stated in *Parker.*

There can be no doubt that actions of the governmental defendants which are alleged to be violations of the Sherman Act were taken entirely pursuant to the authority of Pennsylvania statutory law. Under the Municipalities Planning Code (the "Code"), Wrightstown Township and its Supervisors have the clear authority and duty to rule on zoning matters. Such rulings are taken pursuant to a complex regulatory scheme of land-use management, and the decisions of local governmental officials, such as the defendants herein, are subject to the constant review of superior state agencies and state courts.

This Court has reaffirmed and explained the doctrine of *Parker v. Brown* in numerous cases, the most recent of which is *City of Lafayette, La. v. La. Power and Light Company,* 435 U. S. 389 (1978). The Court concluded that a local governmental unit has immunity from the antitrust laws where its activities are undertaken pursuant

to authority of the state acting as sovereign and went on to enunciate the test for determining whether or not a local municipality has acted pursuant to authority given to it by the state acting as sovereign and therefore enjoys immunity under *Parker v. Brown*:

> "While a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'. 532 F. 2d, at 434." 435 U. S. at 415.

The Supreme Court of Pennsylvania has noted that when Supervisors of a Second Class Township in Pennsylvania enforce zoning regulations "there can be no question that the supervisors' actions were taken in the course of their duties and within the scope of their authority". *Jonnet v. Bodick*, 431 Pa. 59, 62 (1968). Even a cursory review of the Pennsylvania Municipalities Planning Code (53 P. S. § 10101, *et seq.*) will show that the Commonwealth of Pennsylvania has comprehensively regulated land use. The Pennsylvania Municipalities Planning Code clearly authorizes and even mandates the acts of the governmental defendants complained of in the complaint. See Sections 601, 604, 605, 609.1 and 617 (53 P. S. §§ 10601, 10604, 10605, 10609.1 and 10617). It is obvious that the "legislature contemplated the kind of action completed of" herein. *City of Lafayette, supra.*

If this Court were to interfere with the Commonwealth of Pennsylvania's pervasive supervision of zoning

regulation and enforcement, the constitutional foundation of federalism would be severely damaged. It is just this violation of sovereign state power that *Parker v. Brown, supra,* was meant to prevent. No clearer case can be imagined for the judicial restraint of federal power. Accordingly, the decisions of the lower courts herein are in complete accord with this and other courts' decisions construing the doctrine of *Parker v. Brown, supra.*

II. The Complaint Clearly Does Not State a Cause of Action Under the Civil Rights Act or the Constitution of the United States.

A. Plaintiff's Claims Relating to Zoning Do Not Present a Substantial Federal Question and Cannot Be Heard in Federal Court.

The Civil Rights Acts were passed to insure that no person would be discriminated against because of his race, national origin, religion or other class-based reason. In the instant case a corporation is suing a township and its supervisors for merely carrying out their duties under Pennsylvania law to enforce existing residential neighborhoods. The complaint does not make any allegation that governmental defendants applied zoning in a discriminatory manner. Miller was treated exactly like other quarries in Wrightstown Township and there is no allegation to the contrary.

Numerous cases have held that zoning involves the exercise of judgment which is legislative in character and not subject to federal court review unless the plaintiff can show that the defendants acted arbitrarily. *South Gwinett Venture v. Pruitt*, 491 F. 2d 5 (5th Cir. 1974); *Blackman v. City of Big Sandy, Texas*, 507 F. 2d 935 (5th Cir. 1975); *Stone v. City of Maitland*, 446 F. 2d 83 (5th Cir. 1971); *Steel Hill Development, Inc. v. Town of Sanbornton*, 469 F. 2d 956 (1st Cir. 1972).

This Court discussed permissible features of zoning at length in *Village of Belle Terre v. Boraas*, 416 U. S. 1, 9 (1974) by stating:

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

Thus, zoning is an aspect of the State's constitutional police power, and a federal court may not interfere with a local state government in its zoning activities without undermining the constitutional scheme of federalism.

B. The Allegations of Civil Rights Act Violations Were Properly Dismissed.

There is no doubt that the Complaint in this action fails to allege a cause of action under the civil rights statutes. There is no claim of lack of notice or that the hearing procedures awarded plaintiff were inadequate or unfair. Indeed, plaintiff admits in Paragraph 13 of his complaint that several hearings were held concerning the order from the Township for plaintiff to cease and desist from certain activities in connection with quarrying in the 45-acre plot. The plaintiff also admits in Paragraph 21 of the complaint that eight separate hearings were held in connection with the plaintiff's petition to rezone its 12-acre plot. Plaintiff further admits in Paragraph 29 of the complaint that hearings and proceedings took place before the Pennsylvania Environmental Board. There is no allegation anywhere in the complaint of any arbitrary action by any of the defendants. In fact, as the courts below recognized, there are no specific allegations of any kind in the Complaint. For example, paragraph 23 refers to "objections" by the "defendants" without identifying which defendants are being accused. Paragraph 28 states that "defendant . . . intervened in that appeal" again without any specific reference. Paragraph 28 is also ambiguous in that it charges that the "Supervisors took no significant part in the proceeding" without specifying what was supposedly done (or not done) and how these alleged actions supposedly violate plaintiff's civil rights. Most importantly, the complaint does not specify what due process rights Miller has been denied or even that there was a denial of due process.

Conclusory allegations of this sort simply do not allege the discriminatory acts necessary to state a cause of action under the civil rights statute. *Rotolo v. Borough of Charleroi*, 532 F. 2d 920 (3d Cir. 1976); *Negrich v. Hohn*, 379 F. 2d 213 (3d Cir. 1967).[6]

6. While the Civil Rights Act creates a federal cause of action, the immunity of particular public officials from liability is determined by reference to the principles of state common law. *Tenney v. Brandhove*, 341 U. S. 367 (1951); *Dombrowski v. Eastland*, 387 U. S. 82 (1967); *Bauers v. Heisel*, 361 F. 2d 581 (3d Cir. 1966). In Pennsylvania, immunity is well established for township supervisors as high governmental officials. In *Jonnet v. Bodick*, 431 Pa. 59 (1968), the Supreme Court of Pennsylvania in a zoning action held:

> "There are no more important officers in second class townships than the supervisors. They exercise the entire legislative and executive powers of the municipality and there can be no doubt of the fact that they do indeed exercise policy-making functions. We hold that the supervisors are within the class of 'high public officials' protected by absolute privilege." 431 Pa. at 62 [emphasis added]

The Supreme Court of Pennsylvania has recently reaffirmed the principle in *DuBree v. Commonwealth of Pennsylvania*, 393 A. 2d 293 (1978) that the public has an important interest in shielding

C. No Conceivable Fourteenth Amendment Claim Has Been Alleged.

In *Washington v. Davis,* 426 U. S. 229 (1976), this Court discussed the purpose of the equal protection clause of the Fourteenth Amendment holding:

> "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." 426 U. S. at 239.

The Court recognized that consideration of race normally introduces a capricious and irrelevant factor working an invidious discrimination. *Anderson v. Martin,* 375 U. S. 399 (1964); *Germann v. Kipp,* 429 F. Supp. 1323 (W. D. Mo. 1977). Obviously, plaintiff Miller & Son Paving, Inc., does not allege any racial discrimination on the part of defendants.

But even more than this, Miller cannot and did not allege any discrimination of *any kind* against it. Miller's primary complaint is that Wrightstown Township and its Supervisors refused to change the zoning of a particular

6. (Cont'd.)
public officials with decision making authority from the threat of personal liability.

The necessity for this immunity is seen most clearly in the instant situation. The Supervisors, who are given the power, obligation and duty under Pennsylvania law to protect their township and the citizens of their township by the proper use of zoning, have refused to permit plaintiff to expand its quarry operations in the township. After hearings and upon presentation of all positions, the Supervisors made the decision that state law authorizes and compels them to do. If every party who loses a zoning case can bring the Supervisors to court for their refusal to agree with them, then the Supervisors will not be able to decide openly and freely what is best for their constituents. The immunity of high public officials, which has long been established in Pennsylvania, serves an important democratic principle. This court has established that such immunity doctrines are to be applied by federal courts in civil rights cases. Thus, the decision of the Court of Appeals and the District Court were clearly in accord with applicable law.

piece of land in accordance with plaintiff's wishes. If it is conceivable that there could be an equal protection claim as to some aspects of zoning, this certainly is not such a situation. There are no allegations, as indeed it is not true, that Wrightstown Township and the Supervisors changed the zoning on the land where Miller is presently mining forcing it to shut down its operations. All that defendants are charged with doing is enforcing valid land-use regulations. Far from invidious discrimination, there is no discrimination alleged at all.

This Court has held that zoning ordinances "where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people" are a proper exercise of zoning power. *Village of Belle Terre v. Boraas,* 416 U. S. 1, 9 (1974). This Court, in *County Board of Arlington County, Virginia v. Richards,* 434 U. S. 5 (1977), found that a zoning ordinance prohibiting non-residents from parking in a community was constitutional. The Court concluded that social and environmental objectives are not prohibited by the Constitution, stating:

> "The Constitution does not outlaw these social and environmental objectives, nor does it presume distinctions between residents and non-residents of a local neighborhood to be invidious. The Equal Protection Clause requires only that the distinction drawn by an ordinance like Arlington's rationally promote the regulation's objectives. . . . On its face, the Arlington ordinance meets this test." 434 U. S. at 7.

Plaintiff has not alleged in its Complaint that the acts of Wrightstown Township and its Supervisors are arbitrary or capricious. Therefore, for this reason alone, the Fourteenth Amendment cannot apply to plaintiff's claim.

In addition, of course, there is no allegation in Miller's Complaint that the acts of Wrightstown Township and the

Supervisors were done with the intent to discriminate against plaintiff. Accordingly, the claims under the Fourteenth Amendment were properly dismissed under this Court's rulings in *Arlington Heights v. Metropolitan Housing Corporation*, 429 U. S. 252 (1977) and *Washington v. Davis*, 426 U. S. 229 (1976).

CONCLUSION.

For all the reasons expressed herein, the governmental defendants submit that there is no doubt that the complaint in this case was properly dismissed. There exists no issue of law pertinent to this case which is unsettled. There is no conflict among the circuits with regard to this case. In short, the plaintiff has attempted to make a federal case out of a zoning dispute and the Court of Appeals merely reached the obvious conclusion that dismissal of the complaint was mandated by numerous well-established rules of law.

Respectfully submitted,

LEONARD BARRACK,
GERALD J. RODOS,
PAUL J. MCMAHON,
BARRACK, RODOS & MCMAHON,
2000 Market Street,
Philadelphia, Pa. 19103
(215) 963-0600

Attorneys for Respondents, Wrightstown Township, Harrison E. Dow, Aldenlee Spell and N. Kline Fisher.

Of Counsel:
RONALD H. SHERR,
SPENCER, SHERR & MOSES, P. C.,
107 E. Main Street,
Norristown, Pa. 19401
(215) 279-5300